ORIGINAL

Supreme Court, U.S.
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No. 90-1713

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA
Plaintiff/Appellee

v.

ALEJANDRO GARCIA IBARRA
Defendant/Appellant

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Stephen M. Kissinger
Attorney at Law
530 Oak, Room 12
Douglas, WY, 82633
(307) 358-9821

Attorney for the Respondent
Alejandro Garcia Ibarra

## QUESTION PRESENTED

Whether the time to file a notice of appeal from an order on a motion to suppress evidence is extended by the filing of any pleading seeking reversal of that order.



## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | 2 |
| Table of Contents | 3 |
| Table of Case, Statutes and Other Authorities Cited | 4 |
| Reasons for Denying the Writ | 5 |
| Conclusion | 9 |

**TABLE OF AUTHORITIES**

**Cases**


| | *Page* |
|---|---|
| *United States v. Dieter*, 429 U.S. 6, 8, 97 S.Ct. 18, 50 L.Ed.2d 8 (1976) | 8 |
| *United States v. Head*, 737 F.Supp. 1287, 1288 (W.D.N.Y. 1990) | 6 |
| *United States v. Healy*, 376 U.S. 75, 84 S.Ct. 553, 11 L.Ed.2d 527 (1964) | 5, 7 |
| *United States v. Ladson*, 774 F.2d 436 (1985) | 8, 9 |




**REASONS FOR DENYING THE WRIT**

The decision of the United States Court of Appeals for the Tenth Circuit adheres to the long-standing rule of this Court that it is the content, rather than the mere caption, of a pleading which determines whether the filing of the same delays the commencement of the time during which a party must file a notice of appeal. The extremely narrow exception to the general rule which the court applied enforced the caveat of this Court in *United States v. Healy*, 376 U.S. 75, 80 at n. 4 (1964), and is consistent with not only the decisions of this Court but those of the various circuits.

1. The Government initially argues that this Court should reverse the court of appeals and adopt a rule which postpones the start of the period of time within which a party must file a notice of appeal until the district court has ruled upon <u>any</u> document which asks it to reverse its prior ruling. The Government reasons that such a rule would encourage a correct resolution of cases at the district court level without the expenditure of appellate resources. Petition for Writ of Certiorari, Page 8. Because the decision below is limited solely to pleadings which attempt to raise specifically conceded factual issues, Petition for Writ of Certiorari, Appendix A, Pages 10a-11a, at n. 7., this argument presupposes that consideration of a mixed issue of law and fact which has been specifically conceded

prior to evidentiary hearing can, under certain circumstances, produce a correct result. Notwithstanding the Government' attempt to cloud the waters with its footnote citation of cases involving legal issues based upon undisputed facts, Petition for Writ of Certiorari, Pages 9, at n. 4, the court of appeals rightly observed that a correct result can never be reached under such circumstances. Petition for Writ of Certiorari, Appendix A, Pages 10a-11a, at n. 7, citing *United States v. Head*, 737 F.Supp. 1287, 1288 (W.D.N.Y. 1990).

2. The Government next contends that the decision of the court of appeals created a broad and ill-defined exception to the principle that the time for filing a notice of appeal does not begin until the denial of a timely motion for reconsideration. Petition for Writ of Certiorari, Page 9. The Government further avers that the court of appeals' decision would bar motions for reconsideration based upon new legal or factual arguments. Both allegations are patently false.

The court of appeals specifically limited its decision solely to whether a motion for reconsideration may seek review of issues which have been raised, then expressly conceded, prior to hearing, thus invoking the reliance of the court and the opposition. Petition for Writ of Certiorari, Appendix A, Pages 10a-11a, at n. 7. Further, the court of appeals specifically refused to extend its decision to cases involving new grounds for relief.



Petition for Writ of Certiorari, Appendix A, Page 11a, at n. 7.

Rather than create a broad and ill-defined exception to the general rule, the court of appeals denied jurisdiction in a single case involving a very narrow exception to the general rule. The exception is certainly no wider than that set forth in *United States v. Healy, supra*, 376 U.S. at 80, n. 4. Given the Government's consistent inability to provide any basis in law or fact for asking the district court to consider an issue raised and then conceded prior to hearing, there is at least some question whether the court of appeals' decision is anything more than an application of that specific exception noted in *Healy*.

3. The Government's third justification for asking this Court to remove all exceptions from the general rule scarcely bears comment. It suggests that the Government's inability, or refusal, to present concordant arguments through the various United States Attorney's Offices somehow warrants a rule which would allow it to harmonize those inconsistent arguments, if indeed they prove unsuccessful. While the Government is certainly free to seek to obtain collateral benefits from properly filed motions for reconsideration, its desire for such benefits cannot justify the use of improperly filed motions to fulfill that purpose.

4. The Government's fourth justification for seeking the writ is the claim that the court of appeals failed to follow the bright line rule of *United States v. Dieter*, 429

U.S. 6 (1976). The court, in fact, did follow *Dieter*, by not allowing the government to extend its appeal rights simply by filing a document entitled a motion for reconsideration. In *Dieter*, the United States Supreme Court observed that the consistent practice in civil and criminal cases has been to treat timely petitions for rehearing as rendering the original judgment non-final as long as the petition is pending. 429 U.S. at 8. The Court held that it was not the designation of the pleading which determined whether the time for appeal was delayed, but whether the purpose and effect of the pleading was that of a motion for rehearing. 429 U.S. 8-9. Thus *Dieter* itself recognizes that not every post-decision motion extends the time for filing a notice of appeal. The court of appeals, as did the district court, found the purpose of the Government's motion not to obtain reconsideration of the district court's suppression order, but to revitalize a previously conceded issue after it had induced the Respondent into not developing the factual basis necessary to oppose that issue. Petition for Writ of Certiorari, Appendix A, Pages 10a-11a, at n. 7, Page 22a.

5. The final ground asserted by the Government as meriting review through writ of certiorari is also unfounded. It contends that a conflict exists between the case below and the holding of the Eleventh Circuit in *United States v. Ladson*, 774 F.2d 436 (1985). As noted above, the court of appeals in the case below specifically refrained



from reaching the holding in *Ladson*. Petition for Writ of Certiorari, Appendix A, Pages 10a-11a, at n. 7. The court of appeals applied an extremely limited exception to the general rule governing the effect of motions for reconsideration on the time for filing notes of appeal. Not only does its decision not conflict with *Ladson*, it does not conflict with the holding of any other circuit.

When, as is the case here, a pleading filed after an adverse determination following an evidentiary hearing seeks to raise an issue of law and fact which a party has conceded prior to hearing, the pleading serves only to delay the imposition of justice as does a countenancing of such a pleading by allowing it to postpone the inception of the time for filing a notice of appeal. The question below was not whether parties to criminal actions will hereafter be able to determine when an order is final, it was whether they may play fast and loose with the law.

**CONCLUSION**

The petition for writ of certiorari should be denied.

Respectfully submitted,

Stephen M. Kissinger
Attorney at Law
530 Oak, Room 12
Douglas, WY 82633
(307) 358-9821
Attorney for the Respondent
Alejandro Garcia Ibarra

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| ALEJANDRO GARCIA IBARRA | ) | |
| | ) | |
| Respondent. | ) | |

CERTIFICATE OF SERVICE

I certify that three true and correct copies of Respondent's Motion to Proceed in Forma Pauperis were placed in the United States Mail, first class postage prepaid, on the 12th day of June 1991, addressed to:

Kenneth W. Starr
Solicitor General
Department of Justice
Washington, D.C. 20530